STATE OF VERMONT
BOARD OF MEDICAL PRACTICE

In re:	)	MPC 15-0203	MPC 110-0803
	)	MPC 208-1003	MPC 163-0803
David S. Chase,	)	MPC 148-0803	MPD 126-0803
	)	MPC 106-0803	MPC 209-1003
Respondent.	)	MPC 140-0803	MPC 89-0703
	)	MPC 122-0803	MPC 90-0703
	)		MPC 87-0703

RESPONDENT'S REPLY MEMORANDUM IN SUPPORT OF HIS MOTION TO DISMISS SUPERCEDING SPECIFICATION OF CHARGES BASED ON THE STATE'S FAILURE TO DISCLOSE EXCULPATORY AND OTHER EVIDENCE

Respondent, David S. Chase, M.D., through counsel, hereby submits the following Reply Memorandum in support of his pending Motion to Dismiss.

MEMORANDUM OF FACT AND LAW

I. Introduction.

Through his pending Motion to Dismiss, Dr. Chase brought to the Board's attention the apparent failure of the Board and the State to turn over two categories of relevant and exculpatory evidence in this matter. First, the Board investigator failed to produce his notes of his interviews with at least two key witnesses, Susan Lang and Judith Salatino. Those notes remain unproduced and unavailable to Dr. Chase, in violation of Board Rules. Second, Dr. Chase demonstrated that the Board failed to include highly exculpatory portions of Judith Salatino's medical records when it produced a copy of those records on August 14, 2003.

In attempting to justify its failure to produce relevant interview notes, the State first contends that its own patient-witnesses---the same witnesses upon whom it is relying in support of its career-ending allegations against Dr. Chase---cannot be believed when they testify under

oath that the Board's investigator took notes during his interviews with them. Instead, it requests the Board to credit the diametrically opposite testimony of the very investigator who has withheld the notes. Second, the State acknowledges that the Board's investigator made at least one page of notes of his interview with Judith Salatino, and alleges for the first time that those notes have already been produced. The State's newfound argument in this regard is unassailably refuted by the substance of the single page of notes it produced and by the State's own prior characterization of that document---both of which show that the produced notes are unrelated to the investigator's interview of Ms. Salatino. Simply put, the State has changed its story in an attempt to cover up yet another of the Board investigator's prejudicial missteps.

In response to Dr. Chase's argument that the Board failed to produce a complete copy of Ms. Salatino's medical records on August 14, 2003, the State does not seriously contend that it did, in fact, produce a complete copy of those records on that date, as it had earlier represented. Nor does it take issue with Dr. Chase's assertion that he and his counsel relied upon that materially incomplete set of medical records in preparing his defense in this matter. However, the State correctly points out that it had previously produced a complete copy of those medical records to Dr. Chase on July 30, 2003, and contends that Dr. Chase should have recognized the discrepancy between the State's multiple productions. Although Dr. Chase disagrees strongly that it is his responsibility to double-check the accuracy of the State's document production in this matter, he now recognizes that the State did not intentionally or entirely withhold portions of Ms. Salatino's medical records from him. Nonetheless, in the future, both Dr. Chase and the Board should be able to expect that the State and the Board will exercise greater care in making certain that their document productions conform to their representations.

The State and the Board's investigator cannot be allowed to selectively disclaim their own actions or the sworn testimony of their own witnesses in this matter as they see fit. Instead, the Board must hold them responsible for their failure to fulfill their statutory and constitutional obligations by turning over all of the relevant investigative materials in the Board's possession. Because the Board's investigator and the State have failed to live up to these obligations, the Board must dismiss the Superceding Specification of Charges on this ground alone.

II. Discussion.

A. The Board Has The Authority To Dismiss The Superceding Specification Of Charges.

As its primary response to Dr. Chase's Motion to Dismiss, the State once again trots out the hubristic and dangerous argument that only ***it*** has the power to dismiss charges that the Board has brought against Dr. Chase, even if the Board determines that those charges lack merit or that the Board proceeding has been rendered fundamentally and unconstitutionally unfair. According to the State, the Board is powerless to dismiss charges short of a full-blown trial on the merits, even if the Constitution and public confidence in the fairness of Board proceedings demand otherwise. The Board has implicitly rejected this absurd argument before, and should do so again.

As an initial matter, the Board's enabling legislation clearly contemplates that the Board may dismiss charges against a Respondent for reasons apart from guilt or innocence:

> If a person complained of is found not guilty, ***or the proceedings against him are dismissed***, the Board shall forthwith order the dismissal of the charges and the exoneration of the person complained against.

26 V.S.A. 1361(c) (emphasis added). This plain language interpretation of section 1361(c) does not create superfluity in the statute, as the State once again strains to argue. Rather, section 1361

simply makes clear that if the Board determines that dismissal is appropriate, it "***shall***" formally order the dismissal and exoneration of the respondent. Put differently, the statute sensibly provides the Board with no choice other than dismissal when the facts and law require.

The remainder of the Board's enabling legislation, as well as controlling caselaw, support this common sense reading of section 1361(c). In laying out the "powers and duties of the Board," 26 V.S.A. § 1353 makes clear that the Board may "undertake any such other actions or procedures . . . required or appropriate to carry out, the provisions of this chapter." 26 V.S.A. § 1353(4). And as even the State acknowledges, the Supreme Court has stated that this Board has both the powers "expressly conferred upon it by the Legislature" and "such incidental powers . . . necessarily implied as are necessary to the full exercise of those granted." Perry v. Medical Practice Board, 169 Vt. 399, 403 (1999). Here, the Board has the power to bring charges of unprofessional conduct against a medical professional. See 26 V.S.A. § 1356. The Board also has the power to regulate the disciplinary proceedings before it. 26 V.S.A. § 1353. The power to bring charges against a doctor and to regulate the disciplinary proceedings necessarily carries with it the power to terminate those proceedings by dismissing the charges when the facts and the law require it.

B. The Board Has Failed To Produce Its Investigator's Records Of Interviews With Key Witnesses.

The State next contends that the Board's investigator did not take any notes during his interviews of most of the State's key witnesses, and that he has already produced the few notes that he did possess. The position taken by the State and the investigator is at direct odds with the sworn testimony of the State's own key witnesses in this matter and is refuted by the State's own prior characterization of the interview notes that the Board has produced.

1. The State's Own Complaining Witnesses Contradict The Board Investigator's Incredible Statement That He Took No Notes Of His Interviews With A Key Witness.

The State acknowledges that neither it nor the Board has produced notes of the Board investigator's interview with complaining witness Susan Lang. The Board investigator has gone so far as to submit a sworn statement that he did not bother to take notes of his interview with this key witness. (See Affidavit of Philip J. Ciotti, submitted in support of the State's Memorandum in Opposition.) The investigator's sworn testimony is at direct odds with that of Ms. Lang herself. While under oath at her deposition, Ms. Lang testified in no uncertain terms that the investigator did take notes during his interview of her:

Q: Now you said you had an in-person meeting with Phil Ciotti and Virginia Werneke; right?

A: Right

. . . .

Q: Did they call and ask you to come in?

A: They did.

Q: And how long did you meet with them.

A: Not as long as this. A matter of an hour.

Q: Did either Phil or Virginia take notes during that meeting?

A: They both did.

Q: And were they asking you the same sorts of questions that we are talking about today?

A: Pretty much, not so much on the way back, but very similar types of questions.

(Transcript of 7/6/04 Deposition of Susan Lang at 103:6 through 104:5, attached hereto as Ex. A.)

Of course, Ms. Lang's testimony on this point makes sense. She is one of just thirteen complaining witnesses upon whom the State's entire case is built. She was interviewed by the Board's investigator for approximately one hour. During that interview, she answered countless questions regarding her recent visits to Dr. Chase's office—the same visits that form the core of the State's allegations as set forth in the Superceding Specification of Charges. The investigator's assertion that he took absolutely no notes during this important interview is implausible, at best.

Unlike the State and the Board's investigator, Ms. Lang has absolutely no stake in whether or not the investigator's notes exist or should be turned over. Nonetheless, the State has shamelessly decided to disavow her unequivocal testimony on this point, even as it relies upon the remainder of her testimony in its attempt to end Dr. Chase's 30-year career. The Board should not indulge the State's efforts to strategically pick-and-choose the testimony of its own witnesses in an effort to save its case from the actions of the Board's investigator. It should credit Ms. Lang's testimony on this point and dismiss the charges against Dr. Chase in light of the State's and the Board's failure to turn over the interview notes to which Dr. Chase is entitled.

2. The State Acknowledges That The Board's Investigator Created Notes Of His Interview With Ms. Salatino, But Incorrectly And Disingenuously Asserts That Those Notes Have Been Produced.

In its Opposition to Dr. Chase's Motion to Dismiss, the State admits that the Board's investigator created notes of his interview with Ms. Salatino, who was one of the State's original three complaining patients. (See State's Opposition at 3.) The State then goes on to assert that it produced those notes to Dr. Chase pursuant to an October 21, 2003 letter from Assistant

Attorney General Winn. (Id.) However, even the most cursory examination of the State's evidence on this point demonstrates that the document it produced is not the investigator's notes of his interview with Ms. Salatino, as the State has represented. Those notes remain unproduced.

In its October 21, 2003 letter to Dr. Chase's counsel, the State turned over one page of handwritten investigative notes bearing Ms. Salatino's name. (See 10/21/03 letter from Attorney Winn to Attorney Miller at 2 and accompanying notes, attached as Ex. 1 to the State's Opposition to Respondent's Second Motion to Dismiss.) In that letter, the State identified the notes in question as the "Handwritten Investigative Notes of Phil Ciotti re: Morhun & Devita." It did not identify those notes, or any others, as notes of the investigator's interview of Ms. Salatino. In other words, the document that the State now identifies to the Board as the investigator's notes of his interview with Ms. Salatino was previously identified by the State to Dr. Chase as something very different--- the investigator's notes of his conversation with Dr. Morhun, an ophthalmologist, or Dr. Vincent Devita, an optometrist.

The content of the notes in question support the State's initial identification of the document as a record of the investigator's interview with an eye doctor and entirely discredit the State's current effort to re-label those notes as a record of the Salatino interview. The notes contain reference to technical ophthalmologic terms that a patient such as Ms. Salatino would not use to discuss her experience with Dr. Chase. The notes indicate that the "CST was done dilated" and that there was "no refraction for glasses." (Id.) They go on to note that Ms. Salatino had a "physiological lens for her age" with "no dense central" cataract. (Id.) They conclude with a reference to "no clinical cataract." (Id.) In short, the content of the notes in question makes clear that they do not reflect the statements of a layperson such as Ms. Salatino;

they reflect the comments of an eye doctor regarding his opinion of her condition---just as the State had originally indicated.

The State's about-face in its own description of the notes in question and its attempt to convince the Board that these notes are actually those of the investigator's interview with Ms. Salatino can be most generously described as disingenuous. Once the Board cuts through the State's smokescreen, however, it is left with two unassailable facts: First, by the State's own admission, the Board's investigator interviewed Ms. Salatino and created notes of that interview. Second, no such notes have been produced to Dr. Chase.

Whether standing alone or in combination with the Board's failure to produce notes of the Susan Lang interview, this bald-faced breach of the Board's and the State's disclosure obligations justifies dismissal. Moreover, neither Dr. Chase nor the Board has any way of knowing how many other interview notes, or how much other relevant information, has been withheld by the Board's investigator or the State.[1] The Board cannot allow this proceeding to continue under the resulting shadow of suspicion. Any other conclusion would irretrievably shake the confidence that both regulated professionals and the public must have in the disciplinary process.

C. Dr. Chase Should Not Be Required To Investigate And Verify The Accuracy And Completeness Of The Board's Disclosures.

As his second argument in favor of dismissal, Dr. Chase demonstrated that the Board produced an incomplete copy of Ms. Salatino's medical records to him on August 14, 2003, excluding important exculpatory information. The State does not and cannot seriously dispute that its production on that date, which Dr. Chase relied upon throughout these proceedings as a

[1] As incredible as it may seem, prior to the witness depositions in this matter, neither the State nor the Board's investigator had met in person with most of the State's key complaining witnesses in this matter. Instead, the Board's investigator spoke with most of the witnesses only by phone. As a result, most of the patient witnesses are unable to testify as to whether or not the Board's investigator took notes during his interviews of them.

true and complete copy of Ms. Salatino's medical record, was in fact missing this key information. Nor does the State attempt to explain how several key pages went missing from its August 14th production. Indeed, the State refuses to even acknowledge that when it says it is producing complete and accurate copies of relevant documents, it has a duty to make sure they are in fact complete and accurate.

Instead, the State correctly brings to Dr. Chase's and the Board's attention the fact that it did produce a complete copy of Ms. Salatino's medical records on a completely separate occasion, arguing that Dr. Chase should have discovered and corrected the Board's mistake earlier. In short, the State contends that Dr. Chase cannot rely upon the Board to produce complete and accurate information, but must himself scrutinize the accuracy of what the Board represents as a complete copy of relevant medical records, identify any deficiencies by reference to the other documents that the State had made available, and call upon the State to correct those deficiencies. To describe the State's position is to point out its absurdity. The Board should voice its strong objection to the State's cavalier attitude toward its and the Board's discovery responsibilities in this matter.

Nonetheless, in light of the evidence the State has submitted, Respondent recognizes that the Board did not entirely withhold the missing portions of Ms. Salatino's medical record and apparently excluded them from its August 14, 2003 production as the result of an administrative error, rather than through any actions purposefully directed at denying Dr. Chase the discovery to which he is due. Although this mistake does not by itself justify dismissal, it does call for corrective action on the part of the Board, which should urge the State and the Board to exercise the high level of care that these important proceedings require.

D. It Makes No Difference That The Attorney General Did Not Instruct The Board's Investigator To Withhold The Undisclosed Documents.

In their affidavits, the Board employees emphasize the fact that the State did not instruct them to withhold any information. These assertions are entirely beside the point. Pursuant to Board Rule 19.1, the Board has an obligation to turn over all non-privileged information in its possession that is relevant to the Superceding Specification of Charges. Any failure to fulfill that obligation violates Rule 19.1 and compromises the fairness of these proceedings. It makes little difference whether the State's failures to disclose were caused by purposeful action or neglect. It makes little difference whether those failures were sponsored by the State or not. In the end, it matters only that Dr. Chase, the Board, and the public have confidence that the Board has turned over to Dr. Chase all of the relevant, non-privileged information in its possession, rather than covering it up. Whatever the motivation, the Board's and State's actions to date have shattered that confidence. Dismissal is therefore the only meaningful remedy.

IV. Conclusion.

For the foregoing reasons, Respondent requests that the Board dismiss the Superceding Specification of Charges.

Dated at Burlington, Vermont, this 9th day of August, 2004.

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Exhibit A

STATE OF VERMONT
BOARD OF MEDICAL PRACTICE

In Re:	
David S. Chase,	Docket No. MPC 15-0203
Respondent.	

D E P O S I T I O N

OF

SUSAN LANG

Taken on Tuesday, July 6, 2004, 10:05 a.m., at the offices of Sheehey Furlong & Behm, P.C., 30 Main Street, Gateway Square, Burlington, Vermont.

Appearances....

COURT REPORTERS ASSOCIATES
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arrangements for Dr. Tabin to write him the letter?

A. I asked him.

Q. You asked him to. You asked Dr. Tabin to write that letter?

A. I did.

Q. Now you said you had a in-person meeting with Phil Ciotti and Virginia Werneke; right?

A. Right.

Q. And when did that take place?

A. That's the one I don't remember, but I can find out. I would think that it was in late August.

Q. So not -- within a month or so --

A. Yep.

Q. -- after this all happened?

A. Right.

Q. Where did that take place?

A. On Cherry Street.

Q. Did they call and ask you to come in?

A. They did.

Q. And how long did you meet with them?

A. Not as long as this. A matter of an hour.

Q. Did either Phil or Virginia take notes during that meeting?

A. They both did.

Q. And were they asking you the same sorts of questions that we are talking about today?

A. Pretty much, not so much on the way back, but very similar type questions.

Q. At the time you had that interview, had you already submitted your first unwritten complaint?

A. I think I had. The one with the incorrect dates.

Q. Right. Other than the initial telephone conversation with Mr. Ciotti, the telephone conversation with the Medical Practice Board where you got details as to how to submit the complaint and then the follow-up interview with Mr. Ciotti and Ms. Werneke, did you have -- have you had any other substantive contact with folks from the Medical Practice Board?

A. No.

Q. Have you provided them any other -- any information other than the information that you imparted during those telephone, those --

A. No.

Q. -- conversations?

Have you provided them with any